

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:MWD:OMA:TL-N-5248-99

DRKibler

date: **APR 14 2000**

to: Chief, Examination Division, Midwest District
Attn: Branch Chief Ken Detloff
Further Attn: Team Coordinator Jim Raiman

from: Associate District Counsel, Midwest District, Omaha

subject: **Advisory Opinion**
[REDACTED]

This is our written response to your request for an advisory opinion. We previously provided oral advice on this matter.

ISSUE

Whether a Tax Court decision based upon a settlement of the parties for the [REDACTED] year is a "determination" within the meaning of I.R.C. § 1313(a)(1) so as to allow relief from the expiration of the period of limitations on assessment of a deficiency in tax for the [REDACTED] year.

CONCLUSION

The mitigation provisions are inapplicable since the Tax Court decision which allowed a double allowance of a credit was not a determination on the substantive merits of whether the foreign tax credit was allowable during [REDACTED].

FACTS

The Internal Revenue Service is examining Forms 1120X for the taxpayer's [REDACTED], [REDACTED] and [REDACTED] taxable years. The proposed Revenue Agent's Report (RAR) for the Forms 1120X reflects a deficiency in the amount of \$[REDACTED] for the [REDACTED] year. However, the period of limitations for assessment of a deficiency for the [REDACTED] year expired on [REDACTED] pursuant to I.R.C. § 6501.

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The chronology of events which resulted in a "barred" deficiency is reflected on the chart which follows. In essence, a Form 870 was used to close the [REDACTED], [REDACTED] and [REDACTED] years prior to the closing of the [REDACTED], [REDACTED] and [REDACTED] years, which were in docketed status. The final disposition of the [REDACTED] year allowed a previously unclaimed foreign tax credit and reduced the [REDACTED] allowable foreign tax credit carryover. This resulted in a deficiency in tax in the amount of \$ [REDACTED] for the [REDACTED] year. The Form 1120X filed by the taxpayer for the [REDACTED] year reduced the amount of foreign tax credit claimed in the amount of \$ [REDACTED], which increased the tax liability, which resulted in a deficiency even though taxable income was decreased based upon the Form 1120X.

As reflected in the following chronology, on or about [REDACTED], the taxpayer discovered that a foreign tax credit in the amount of \$ [REDACTED] should have been allowed in its [REDACTED] taxable year. This discovery, with which the Service agreed, occurred during a review of proposed computations upon which a stipulated decision document was to be entered. On [REDACTED], the taxpayer filed a Form 1120X for [REDACTED], [REDACTED] and [REDACTED]. The Form 1120X correctly reduced the foreign tax credit in the amount of \$ [REDACTED] for the [REDACTED] year to correct the double allowance of the foreign tax credit. The effect was to increase the tax liability for the [REDACTED] year with a resultant deficiency in the amount of \$ [REDACTED], assessment of which is barred under I.R.C. § 6501, unless mitigation applies.

CHRONOLOGY

██████████	██████████ Form 1120 filed. No foreign tax credit (FTC) claimed, even though the taxpayer was entitled to it.
██████████	Appeals Settlement of ██████████, ██████████ and ██████████ years pursuant to Form 870. FTC (\$██████████) mistakenly claimed and allowed.
██████████	Assessments of ██████████, ██████████, and ██████████ deficiencies from Form 870.
██████████	The statute of limitations for assessment of a deficiency for the ██████████ year expired. As of this date, neither a closing agreement pursuant to I.R.C. § 7121, nor an agreement pursuant to Treas. Reg. § 1.1313(a)-4, could have been executed, as both require an open year.
¹	While in docketed status (Docket No. ██████████) and during a review of proposed computations upon which a stipulated decision document was to be based for the ██████████, ██████████ and ██████████ taxable years, the taxpayer discovers that \$██████████ of FTC should have been allowed in the ██████████ year. The Internal Revenue Service agrees that the FTC is allowable.
██████████	Stipulated Tax Court Decision entered for ██████████, ██████████ and ██████████ years, which included allowance of FTC for the ██████████ year.
██████████	Form 1120X filed for ██████████, ██████████ and ██████████. Form 1120X correctly reduced FTC in the amount of \$██████████ for the ██████████ year to correct the double allowance of the FTC credit. The effect was to increase the tax liability for the ██████████ year with a resultant deficiency in the amount of \$██████████, assessment of which is barred under I.R.C. § 6501, unless mitigation applies.
██████████	Tax Court Decision for ██████████, ██████████ and ██████████ became final.

¹ We are not aware of the specific date of the discovery. Based upon the date of the entry of the Tax Court Decision, we assume that it occurred after the date on which the period for limitations expired.

In the instant case, the Revenue Agent's theory in support of the applicability of mitigation is that the [REDACTED] Tax Court Decision, which became final on [REDACTED], is a final determination under I.R.C. § 1313(a), and that a double allowance of a credit occurred within the meaning of I.R.C. § 1312(2) when the Tax Court decision became final. The Revenue Agent's alternative theory is, if mitigation is unavailable, that in determining [REDACTED]'s allowable credit for prior minimum tax in years after [REDACTED], the amount of minimum tax "imposed" for [REDACTED] within the meaning of I.R.C. § 53 should not include the \$[REDACTED] that was not assessed (or paid) due to the expiration of the statute of limitations².

LEGAL ANALYSIS

In certain limited situations, I.R.C. §§ 1311 through 1314 provide statutory relief or mitigation of the effect of the statute of limitations and other laws. The statutory provisions do not permit the correction of all errors and inequities. Bolten v. Commissioner, 95 T.C. 397 (1990); Bradford v. Commissioner, 34 T.C. 1051 (1960); Brennan v. Commissioner, 20 T.C. 495 (1953). In general, the mitigation provisions apply where:

- (1) A final "determination", as defined in I.R.C. § 1313(a), has occurred;
- (2) The determination falls within one of the specified "circumstances of adjustment" described in I.R.C. § 1312;
- (3) The party against whom the mitigation provisions are invoked maintained an inconsistent position in the determination and in the treatment of the item in another year, which year is barred by the period of limitation or by some other rule of law. I.R.C. § 1311(b); and
- (4) The party who seeks to utilize the mitigation provisions acts in a timely and proper manner to make a corrective adjustment. I.R.C. § 1314.

Fong v. Commissioner, T.C. Memo. 1998-181.

In the instant case, the second, third and fourth conditions

²This office will provide an opinion relating to the alternative issue under separate cover at a later time.

enumerated above are met. The applicable section 1312 "circumstance of adjustment" in this case is the Tax Court decision which allowed a credit for the [REDACTED] taxable year which was erroneously allowed to the taxpayer for another taxable year ([REDACTED]). I.R.C. § 1312(2). The third and fourth conditions also exist, with the taxpayer claiming, in essence, the "same" foreign tax credit for both of the [REDACTED] and [REDACTED] taxable years, and a timely attempt by the Service to make a corrective adjustment. However, the first condition, a "determination" within the meaning of I.R.C. § 1313(a), does not exist in the instant case, making relief under the mitigation provisions unavailable, as discussed below.

I.R.C. § 1313(a) provides in pertinent part that "... 'determination' means a decision by the Tax Court or a judgment, decree, or other order by any court of competent jurisdiction, which has become final". I.R.C. § 1313(a)(1). Generally, this language has been interpreted to require a court decision that involves a substantive decision on the merits of a case, rather than based merely upon a settlement of the parties. Fong v. Commissioner, T.C. Memo. 1998-181.

In Fong v. Commissioner, T.C. Memo 1998-181, the court held that mitigation was unavailable to the government since no determination of basis within the meaning of I.R.C. § 1312(7)³ occurred where a Tax Court decision was entered upon the basis of a stipulation of settled issues. The Court reasoned that where the specific underlying terms of a settlement agreement is not reflected in the stipulation of settlement, a Tax Court decision based thereon does not satisfy either the determination requirement of section 1313(a) or the more specific requirement of section 1312(7)(A) that the court decision itself determine the basis of the property. The Court also indicated that the government could have avoided the effect of the error by requesting that the taxpayer enter into a closing agreement under I.R.C. § 7121, see Treas. Reg. § 1.1313(a)-2; or into a specific agreement under I.R.C. § 1313(a)(4) to that effect. See also, Treas. Reg. § 1.1313(a)-4. As noted by the Court, the concept is not new that parties to litigation should anticipate the specific requirements of mitigation before entering into settlements. See, Hill v. Commissioner, T.C. Memo. 1957-2, where litigation was instituted for the sole purpose of obtaining a "determination" within the meaning of the mitigation provisions so that a claim for refund could be brought.

³I.R.C. § 1312(7)(A) provides in pertinent part that "[t]he determination determines the basis of property ..."

Further support for the requirement of a substantive decision on the merits of a case as a condition precedent to the finding of a determination within the meaning of section 1313(a)(1) is found in legislative regulations promulgated pursuant to the authority of I.R.C. § 1313(a)(4). The regulations provide that a determination may take the form of an agreement, hereinafter a "regulation agreement", between the taxpayer and the Commissioner if made in strict conformance with the requirements of Treas. Reg. § 1.1313(a)-(4). The purpose of a regulation agreement is to provide an expeditious method for obtaining an adjustment under section 1311. Treas. Reg. § 1.1313(a)-4(a)(1). The following language suggests that a decision by the Tax Court must be based upon a consideration of the merits, rather than upon a stipulation of the parties (unless accompanied by a regulation agreement):

For example, an agreement pursuant to this section may be executed concurrently with ... the execution and filing of a stipulation in a proceeding before the Tax Court of the United States, where an item which is to be the subject of an adjustment under section 1311 is disposed of by the stipulation and is not left for determination by the court.

Treas. Reg. § 1.1313(a)-4(a)(2) (emphasis added).

In the instant case, the facts are materially indistinguishable from Fong, supra. Although the instant Tax Court decision was based upon a settlement of the parties, rather than a stipulation of settled issues, this difference would weigh against the Service. The case in Fong, supra, is arguably stronger for the government than this case since a stipulation of settled issues does contain some information relating to the specific terms of a settlement agreement, unlike the stipulated Decision document entered in the present case. In our opinion, no "determination" within the meaning of I.R.C. § 1313 exists upon which to base a claim for relief under the mitigation provisions.

Please call the undersigned at (402) 221-7333 if you should have any questions.

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(signed) Deanna R. Kibler

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